

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANCISCO JOSE GALLEG0, JR. *et al.*

Plaintiffs,

v.

HECTOR MANUEL GALLEG0
GARCIA,

Defendant.

Civil No. 07cv1185-L(LSP)

**ORDER DISMISSING COMPLAINT
FOR LACK OF SUBJECT MATTER
JURISDICTION AND DENYING AS
MOOT DEFENDANT'S MOTION
TO DISMISS**

Plaintiffs Francisco Jose Gallego, Jr., Rosa Eugenia Gallego and the estate of Francisco Jose Gallego Garcia, Sr. filed a complaint for fraud and other state law torts based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2).¹ Defendant Hector Manuel Gallego Garcia² filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2), (3) and (5) for lack of personal jurisdiction, improper venue and insufficient service, as well as *forum non conveniens*. Because Plaintiffs fail to allege, and the record does not reflect, the facts necessary to determine whether the parties are diverse, the complaint is dismissed for lack of subject matter jurisdiction. Defendant's motion is denied as moot.

The federal court is one of limited jurisdiction. *See Gould v. Mutual Life Ins. Co. of N.Y.*,

¹ Erroneously stated in the Complaint as 28 U.S.C. § 1337(a)(2). (Compl. ¶ 7.)

² For clarity the court will refer to Francisco Jose Gallego, Jr. as Francisco Jose, Jr., to Rosa Eugenia Gallego as Rosa Eugenia, and to Hector Manuel Gallego Garcia as Hector Manuel. No disrespect is intended.

1 790 F.2d 769, 774 (9th Cir. 1986). It possesses only that power authorized by the Constitution
 2 or a statute. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). It is
 3 constitutionally required to raise issues related to federal subject matter jurisdiction, and may do
 4 so *sua sponte*. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998); *see Indus.*
 5 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). A federal court must satisfy
 6 itself of its jurisdiction over the subject matter before proceeding to the merits of the case.
 7 *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577, 583 (1999). The plaintiff bears the burden
 8 of demonstrating that jurisdiction is properly before the court. *See Thornhill Publ'g Co. v.*
 9 *General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

10 Diversity jurisdiction may be based on citizenship as well as alienage. *See* 28 U.S.C.
 11 § 1332(a)(2)-(4). This case involves United States citizens and Mexican citizens. The complete
 12 diversity rule applies in alienage cases. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826,
 13 828 (1989). This means that all plaintiffs must be of different citizenship than all defendants.
 14 *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

15 Plaintiffs allege that Rosa Eugenia “is a Mexican citizen with permanent resident status in
 16 the United States and resides in San Diego, California.” (Compl. ¶ 3.) For purposes of section
 17 1332, “an alien admitted to the United States for permanent residence shall be deemed a citizen
 18 of the State in which such alien is domiciled.” 28 U.S.C. § 1332(a). However, Plaintiffs do not
 19 allege where Rosa Eugenia is domiciled. This alone is a defect in their pleading of federal
 20 jurisdiction. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-58 (9th Cir. 2001).

21 Plaintiffs allege that Francisco Jose, Jr. “is a United States Citizen and lives in San Diego,
 22 California.” (Compl. ¶ 2.) They do not disclose anywhere in the record the state of his domicile.
 23 *See Kanter*, 265 F.3d at 857. Again, this alone is a defect in their pleading of federal
 24 jurisdiction. *Id.* at 858.

25 Furthermore, Francisco Jose Jr.’s declaration contradicts the allegations in the complaint.
 26 He states he is a United States citizen who currently resides and has resided in Tijuana, Mexico
 27 since 1998. (Francisco Jose, Jr. Decl. ¶ 1.) “[T]o be a citizen of a State within the meaning of
 28 the diversity statute, a natural person must both be a citizen of the United States and be


domiciled within the State.” *Brady v. Brown*, 51 F.3d 810, 815 (9th Cir. 1995), citing *Newman-Green*, 490 U.S. at 828. If Francisco Jose, Jr. is not domiciled in any State in the United States, he is neither a citizen of a State nor an alien for purposes of section 1332. *Brady*, 51 F.3d at 815; *see also Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68 (2nd Cir. 1990). Section 1332(a) does not provide that the courts have jurisdiction over a suit to which such persons are parties. *Cresswell*, 922 F.2d at 68.

Plaintiffs allege that Hector Manuel is a citizen of Mexico. (Compl. ¶ 6.) His residency is unclear. Although Hector Manuel strenuously disputes it (*see* Hector Manuel Decl. ¶¶ 2-6), Plaintiffs presented evidence that he resides in San Diego, California. (Rosa Eugenia Decl. ¶ 15; Zeldes Decl. Ex. A & E.) Plaintiffs do not indicate whether Hector Manuel is admitted to the United States for permanent residence or whether he is domiciled in California. If he is admitted for permanent residence and is domiciled in California, he is deemed a citizen of California. *See* 28 U.S.C. § 1332(a). As a California citizen, he would most likely not be diverse from Rosa Eugenia.

Because Plaintiffs do not allege, and the record does not reflect, the facts necessary to establish diversity as required by 28 U.S.C. § 1332, the complaint is **DISMISSED** for lack of subject matter jurisdiction. Plaintiffs may amend the complaint. *See* 28 U.S.C. § 1653. Any such amended complaint shall be filed no later than **April 28, 2008**. Defendant’s pending motion to dismiss is **DENIED AS MOOT**.

IT IS SO ORDERED.

DATED: March 24, 2008


M. James Lorenz
United States District Court Judge

COPY TO:

HON. LEO S. PAPAS
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL